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COURT OF CRIMINAL APPEALS
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NO. PD-0478-20

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

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COURT OF CRIMINAL APPEALS
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ROBERT F. HALLMAN,

APPELLANT,

V.

STATE OF TEXAS

From the Court of Appeals for the Second District of Texas
02-18-00434-CR
Appeal in Cause No. 1548964R in Criminal District Court No. 1 of Tarrant County, Texas, the Hon. Sheila Wynn presiding over voir dire; the Hon. Keith Dean presiding over guilt/innocence; the Hon. Elizabeth Beach presiding over pretrial and punishment

STATE'S PETITION FOR DISCRETIONARY REVIEW

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

Pursuant to Tex. R. App. P. 68.4(a), the following is a complete list of the trial court judge, all parties to the trial court's judgment, and the names and addresses of all trial and appellate counsel:

1. The parties to the trial court's judgment are the State of Texas and Robert F. Hallman, the Appellant.

2. Leticia Martinez, attorney of record for the Appellant at trial, 420 Throckmorton, Suite 200, Fort Worth, Texas 76102.

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5. Sharen Wilson, Criminal District Attorney, attorney for the State of Texas, her assistants at trial, Ashlea Deener and Samantha Fant, and her assistants on appeal, Joseph W. Spence and Shelby J. White, 401 W. Belknap, Fort Worth, Texas, 76196-0201.

6. Hon. Sheila Wynn, judge presiding over voir dire.

7. Hon. Keith Dean, judge presiding at trial.

8. Hon. Elizabeth Beach, judge presiding over pretrial and punishment.

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STATEMENT REGARDING ORAL ARGUMENT

This case involves the State's alleged violation of Article 39.14 of the Texas Code of Criminal Procedure, and the trial court's denial of Appellant's motion for mistrial. Issues include whether the Court of Appeals adopted the correct standard of review for the denial of a motion for mistrial, and, if so, whether the Court of Appeals properly applied the standard of review. This case also involves the question of whether the Court of Appeals erred in reversing the trial court's judgment of conviction by holding that had the impeachment evidence been disclosed there is a reasonable probability the trial court's outcome would have been different.

The State believes oral argument will help the Court decide these issues.

STATEMENT OF THE CASE

Appellant Robert Hallman was charged with Count 1: continuous sexual abuse of a child under 14; Counts 2-3: aggravated sexual abuse of a child under 14; Counts 4-6: indecency with a child by contact; and Count 7: sexual assault of a child under 17. [RR 10:21-24; CR 6-7, 278-89]. Appellant pled not guilty to all counts. [RR 10:21-24; CR 278-89]. The jury found Appellant not guilty on Count 1, and guilty on Counts 2 through 7. [CR 234-40]. The jury sentenced Appellant to life imprisonment on six counts. [CR 269-75, 278-89].

During the punishment phase of trial, Appellant moved for a mistrial based on a purported violation of Article 39.14. [RR 18:51-53, 61]. Appellant argued that the State failed to timely disclose a family violence packet prepared by police regarding a 2014 family violence assault charge against Appellant. [RR 18:61-64]. The trial court denied the motion, finding that the offense report from the same 2014 assault, which the State had disclosed to Appellant, contained substantially the same information as the family violence packet. [RR 18:66, 68-69]. The Fort Worth Court of Appeals reversed, holding that Kim's handwritten statement in the family violence packet was favorable impeachment evidence, and that had the handwritten statement been disclosed, there was a reasonable probability that the trial's outcome might have been different. *Hallman v. State*, --S.W.3d--, No. 02-18-00434-CR, 2020 WL 2201908, at **17-18 (Tex. App.—Fort Worth May 7, 2020). [App. A].

STATEMENT OF PROCEDURAL HISTORY

The Fort Worth Court of Appeals reversed the trial court's ruling in a published opinion on May 7, 2020. *Hallman*, 2020 WL 2201908. The State did not file a motion for rehearing or reconsideration. The State's Petition for Discretionary Review was originally due on June 8, 2020; however, this Court granted the State's motion for extension of time to file the petition, and the State's Petition is due on July 27, 2020.

QUESTIONS PRESENTED FOR REVIEW

Pursuant to Tex. R. App. P. 68.4(g), the following questions are presented for review:

1. Did the Court of Appeals err when it conducted a purely *de novo* review of the trial court's denial of a motion for mistrial for an alleged *Brady* violation, a ruling which is traditionally reviewed for an abuse of discretion?

2. In concluding that the non-disclosed evidence in this case was material because it "might have tipped the balance and resulted in an acquittal," did the Court of Appeals erroneously diverge from the proper materiality standard, specifically that evidence is material only if there is a reasonable probability that, had it been disclosed, the outcome of the trial would have been different?

3. In light of the entire body of evidence, did the Court of Appeals err in concluding that Appellant's ability to impeach a witness regarding a distant extraneous offense with her own handwritten statement in reasonable probability would have resulted in a different outcome at trial, when that witness was actually impeached on the same issue in a different manner?

INTRODUCTION

For many years, this Court has followed a well-established three-pronged test under *Brady* to determine whether the failure to disclose evidence is material. Importantly, non-disclosure does not create strict liability on the part of the State. Rather, the materiality prong under *Brady* requires a defendant to establish that there is a reasonable ***probability*** that, had the evidence been disclosed, the outcome of the trial ***would*** have been different. *Diamond v. State*, --S.W.3d--, No. PD-1299-18, 2020 WL 3067582, at *7 (Tex. Crim. App. June 10, 2020). The materiality prong does not speak in terms of "possibility" or that the outcome "could" have been different. As this Court held in *Hampton v. State*, "The mere possibility than an item of undisclosed information might have helped the defense or might have affected the outcome of trial, does not establish 'materiality" in the constitutional sense." *Hampton v. State*, 86 S.W.3d 603, 612 (Tex. Crim. App. 2002). Furthermore, the materiality standard requires a court to examine "the alleged error in context of the entire record ***and the overall strength of the State's case***." *Diamond*, 2020 WL 306782, at *7 (emphasis added).

In this case, the Fort Worth Court of Appeals erred in applying a "possibility" rather that "probability" standard to the materiality prong, and in failing to consider the overall strength of the other evidence adduced by the State. The ultimate result of the Court of Appeals' holding is that speculative, low-value impeachment

evidence of a non-complaining witness, concerning an extraneous and attenuated offense, is now considered "material" under *Brady*. The result of the Court of Appeals' precedent is essentially a strict liability standard for *Brady* violations.

Moreover, as a threshold issue, the Court of Appeals did not afford the appropriate deference to the trial court's ruling on the motion for mistrial. Normally, a denial of a motion for mistrial is reviewed for an abuse of discretion. But the Court of Appeals, while giving lip service to the abuse of discretion standard, actually applied what was essentially a *de novo* standard of review in reviewing the alleged Article 39.14 violation.

ARGUMENT AND AUTHORITIES

I. Relevant Facts.

A. Amy and Rita make a delayed outcry.

Appellant and his wife Kim[1] divorced in 2016. [RR 11:106]. They have four children together. [RR 11:101-02]. Two of their daughters, Amy and Rita, are the complainants in this case. [CR 6-7]. In March 2016, Rita out-cried to Kim that she had been sexually abused by Appellant. [RR 10:251-52; 11:138-41, 251; 12:131-32]. In 2017, Amy also out-cried that she had been sexually assaulted by Appellant [RR 10:263; 11:141-45, 274; 12:134]. In 2017, Appellant was ultimately indicted on

[1] Because the complainants were minor children at the time of the offenses, the State identifies the parties by the pseudonyms used by the Court of Appeals.

varying counts of sexual assault of a child. [CR 6-7]. These sexual assault offenses are the subject matter of this appeal.

B. The offense report of the August 10, 2014, extraneous offense is disclosed prior to trial.

Prior to trial, the State filed a notice of prior bad acts/extraneous offenses that might be used as evidence at trial. [CR 139-43]. One extraneous offense contained in the State's Rule 404(b) notice involved Appellant's 2014 conviction for assault/bodily injury/family violence. [CR 139-140 at ¶ 9]. This assault conviction arose out of an August 10, 2014, incident involving an argument between Appellant and Kim. *Hallman*, 2020 WL 2201908, at **1-2. Officer Cesar Robles, the responding officer, prepared an "offense report" for the August 10, 2014, family violence incident. *Id.* at *2. [RR19:State's Ex. 36]. This offense report was produced to Appellant by the State during pretrial discovery. [RR 18:51-53].

C. The family violence packet from the August 10, 2014, extraneous offense is not timely disclosed prior to the guilt/innocence phase of trial.

The contents of the offense report for the August 10, 2014, incident made specific reference to a "Family Violence Packet" and a written statement. [RR 19:State's Ex. 36 at 584, 586]. The family violence packet consists of 13 pages. [RR 19:Defense Ex. 28]. *Hallman*, 2020 WL 2201908, at *1, *5. Central to this appeal is the fact that the State did not produce the family violence packet to Appellant until

the punishment phase of trial. *Id.* at *1.[2] The Court of Appeals' opinion in this case turns on the existence of a single page from the family violence packet that contains a handwritten statement of Kim regarding the August 10, 2014, incident. *Id.* at **17-18.

D. Kim testifies at trial regarding the August 10, 2014, extraneous offense.

The State called Kim during the State's case-in-chief. [RR 11:100]. On direct examination, the State asked Kim about the August 10, 2014, incident. [RR 11:133].[3] Kim's testimony was limited to stating that Appellant was arrested as a result of this incident. [RR 11:133]. On cross-examination, Appellant's counsel asked Kim if she had ever told police officers that she suspected Appellant was sexually abusing Amy. [RR 11:203]. Kim testified that at the time of the August 10, 2014, incident, she told the responding officers that she suspected Appellant was sexually abusing Amy. [RR 11:203]. At that point, Kim's handwritten statement to law enforcement regarding the August 10, 2014, incident (which was contained in the family violence packet) had not been disclosed by the State, and, therefore, Appellant was unable to directly impeach Kim with her handwritten statement. Kim's handwritten statement contains a single paragraph that deals with the facts surrounding the family violence

[2] Nothing in the record suggests that the State's failure to produce the family violence packet was anything other than an inadvertent accident.

[3] Unrelated to the issues on appeal, Appellant called the police due to a fight between Appellant and Kim the day before on August 9, 2014. [RR 11:233-235]. Police came to their home, but no one was arrested. [RR 11:233-235].

assault on August 10, 2014. [RR 19:State's Ex. 38]. There is no mention in the handwritten statement that Kim told the responding officers during the August 10, 2014, incident that she suspected Appellant was sexually abusing Amy. [RR 19:State's Ex. 38].

E. Appellant impeaches Kim's testimony by calling one of the responding officers to testify.

The nondisclosure of Kim's handwritten statement did not prevent Appellant from effectively impeaching Kim's testimony that she told the responding officers on August 10, 2014, that she suspected Appellant was sexually abusing Amy. Rather, Appellant called the responding officer, Officer Robles, to testify about the August 10, 2014, incident. [RR 14:203]. Officer Robles, relying on his offense report, testified that Kim never said anything about concerns that her daughter was being sexually abused by Appellant. [RR 14:207]. Officer Robles further testified that another officer, Officer Oakley, was also on the scene, and Officer Oakley similarly had no record that Kim mentioned any concern that Amy was being sexually abused by Appellant. [RR 14:206-07]. Thus, even though Kim's handwritten statement was unavailable to Appellant to impeach Kim's trial testimony, Appellant nonetheless presented to the jury effective impeachment of Kim through Officer Robles' testimony that, on August 10, 2014, Kim never told Officer Robles or Officer Oakley that she suspected Appellant was sexually abusing her children.

F. The family violence packet is disclosed during the punishment phase of trial.

During the punishment phase of trial, the defense made a specific request for the family violence packet from the August 10, 2014, family violence incident, which the State then disclosed. [RR 18:51-53, 61]. Appellant then requested a mistrial under Article 39.14 on the basis that the State's failure to disclose the family violence packet prior to trial affected his trial strategy. [RR 18:61-64]. In particular, Appellant alleged that he would have impeached Kim's testimony that she reported her suspicions of sexual abuse through her own handwritten statement, rather than through the Officer Robles' testimony. [RR 18:46-47, 62-63]. The trial court held a hearing to determine the materiality of the family violence packet and whether its untimely disclosure warranted a mistrial. [RR 18:43-69]. The trial court determined that because the contents of the family violence packet, including the gist of Kim's handwritten statement, were included within the narrative of the offense report, and because Appellant was able to impeach Kim through the officer's testimony, a mistrial was not warranted. [RR 18:66, 68-69].

II. The Court of Appeals applied the wrong standard of review.

Similar to the recent case of *Diamond v. State*,[4] this case presents the threshold question of whether the Court of Appeals incorrectly applied the standard of review in conducting its "materiality" analysis of an alleged Article 39.14 violation.

Traditionally, a reviewing court analyzes the denial of a motion for mistrial based on three factors set out in *Mosley v. State*, 983 S.W.2d 249, 260 (Tex. Crim. App. 1998). In this case, the Fort Worth Court of Appeals substituted the *Mosley* factors that normally govern review of the denial of a motion for mistrial (i.e., severity of misconduct, curative measures, and certainty of conviction) with the three-pronged test used to establish a *Brady* violation. *Hallman*, 2020 WL 2201908, at *17.

The State does not dispute the Court of Appeals' substitution of the three *Mosley* factors with the three *Brady* factors in analyzing a potential Article 39.14 violation.[5] But this substitution does not eliminate the application of the overarching abuse of discretion standard of review and the "zone of reasonable disagreement" analysis applied to the denial of a motion for mistrial. *See e.g. Hawkins v. State*, 135 S.W.3d 72, 76-77, 85 (Tex. Crim. App. 2004) (applying the *Moseley* factors under

[4] *Diamond*, 2020 WL 3067582.

[5] Because Article 39.14 (also known as the Michael Morton Act) is the statutory codification of *Brady*, courts have generally applied the three-factor test under *Brady* in determining whether a failure to disclose under Article 39.14(h) warrants a new trial. *See Hallman*, 2020 WL 2201908, at *7.

the abuse of discretion standard). Thus, underlying the Court of Appeals' *Brady* analysis is the threshold issue of whether the Court actually applied the correct standard of review to begin with, and whether a trial court is owed deference under the "zone of reasonable disagreement" in denying a mistrial for an alleged *Brady* violation.

Here, the Fort Worth Court of Appeals initially acknowledged that the abuse of discretion standard of review applies to review of the denial of a motion for mistrial, and that this standard contains the command that "we must uphold the trial court's ruling if it was within 'the zone of reasonable disagreement.'" *Hallman*, 2020 WL 2201908, at *6. However, the Fort Worth Court of Appeals' analysis does not actually discuss or consider the "zone of reasonable disagreement" factor. *Id.* at *17. Instead, the Fort Worth Court of Appeals, viewing all the evidence in a light ***least favorable*** to the jury's verdict, simply applies a *de novo* review of the "materiality" prong of the *Brady* test. *Id.* Because the Court of Appeals applied the wrong standard of review, review by this Court is warranted under Texas Rule of Appellate Procedure 66.3(f).

III. No matter what standard of review applies, the Fort Worth Court of Appeals erred in applying the materiality prong of the *Brady* test.

However, even if the Fort Worth Court of Appeals was correct in applying a purely *de novo* review of the *Brady* test, and discounting the "zone of reasonable disagreement" analysis, its analysis and ultimate holding are flawed.

A. The Fort Worth Court of Appeals' incorrectly applies a possibility, rather than a probability, standard to the materiality prong of the *Brady* analysis.

To establish reversible error under *Brady*, a defendant must establish that (1) the State failed to disclose evidence, (2) the evidence is favorable to the defendant, and (3) the evidence is material.[6] Evidence is material if there is a reasonable probability that, had it been disclosed, the outcome of the trial would have been different. *Diamond*, 2020 WL 306782, at *7. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Id.* Materiality is determined by examining the evidence collectively, in the context of the entire record and the overall strength of the State's case. *Id.* The "strength of the exculpatory evidence is balanced against the evidence supporting conviction." *Pena v. State*, 353 S.W.3d 797, 812 (Tex. Crim. App. 2011).[7]

The Fort Worth Court of Appeals held that the nondisclosed evidence was material because in reasonable probability it "might have tipped the balance and

[6] Regarding the first two prongs, there is no dispute that the evidence in this case was not disclosed until after the guilt/innocence phase of trial, and that the undisclosed evidence would have been favorable impeachment evidence.

[7] Historically, exculpatory evidence has been more likely to be considered material than mere impeachment evidence. *Compare, e.g., Diamond*, 2020 WL 3067582, at *9 (holding that evidence impeaching a DNA analyst was not material); *Pena*, 353 S.W.3d at 812-13 (exculpatory statements by defendant that substance was hemp, not marijuana, were material). "Exculpatory evidence justifies, excuses, or clears a defendant from fault. Impeachment evidence disputes, disparages, denies, or contradicts other evidence." *Diamond*, 2020 WL 306782, at *7.

resulted in an acquittal… .” *Hallman*, 2020 WL 2201908, at *18. This is the wrong standard. The materiality prong of the *Brady* test speaks in terms of “reasonable probability,” not “possibility,” and that the outcome “would” have been different, not that it “might” have been different. As both United States Supreme Court and this Court have recognized, “[t]he mere ***possibility*** that an item of undisclosed information might have helped the defense, or ***might*** have affected the outcome of the trial, does not establish ‘materiality’ in the constitutional sense.” *Hampton*, 86 S.W.3d at 612 (emphasis added); *see U.S. v. Agurs*, 427 U.S. 97, 109-10 (1976). The Court of Appeals applies the materiality standard too lightly in holding that disclosure of Kim’s handwritten statement “might” have resulted in a different outcome.

Because the Court of Appeals deviated from this Court’s and the United States Supreme Court’s applicable decisions in applying the materiality prong under *Brady*, review is warranted under Texas Rule of Appellate Procedure 66.3(c).

B. The Fort Worth Court of Appeals’ analysis overvalues Kim’s testimony and undervalues the State’s evidence supporting the verdict.

As outlined above, a key component of the *Brady* “materiality” analysis is that the reviewing court should analyze an alleged Article 39.14 violation “in light of all other evidence adduced at trial.” *Hallman*, 2020 WL 2201908, at *12. Materiality is determined by “examining the alleged error in context of the entire record ***and the***

overall strength of the State's case." *Diamond*, 2020 WL 306782, at *7 (emphasis added). This is required so that the reviewing court can determine if the undisclosed impeachment evidence would, in reasonable probability, have produced a different result. *Hallman*, 2020 WL 2201908, at *11.

Here, the Fort Worth Court of Appeals failed to look at "all the other evidence adduced at trial" in the context of the overall strength of the State's case. In particular, the Fort Worth Court of Appeals fails to acknowledge that Amy and Rita, not Kim, are the complainants and therefore the key witnesses. The Fort Worth Court of Appeals never questions (much less addresses) the fact that the jury believed Amy's testimony and other key evidence that supports the conclusion that Amy was telling the truth about Appellant's sexual abuse.[8] Instead, the Court of Appeals seems to view the other evidence adduced at trial solely in the context of **Kim's** credibility. This is evident in the way the Court of Appeals repeatedly describes the "other evidence" in a manner designed to support its belief that Kim lacked credibility instead of analyzing the "other evidence" in the context of the strength of the State's case and the jury's guilty verdict. The Court of Appeals' analysis fails to address the ultimate issue of whether, in the context of viewing all the record

[8] Hallman received the maximum possible sentence on the six individual counts – a life sentence for each one. [CR 269-74]. The fact that the jury sentenced Hallman to the maximum possible sentence contradicts any indication that the jury believed the facts to be in dispute, or that impeachment with Kim's handwritten statement would influenced the guilt/innocence phase of the trial.

evidence, the undisclosed impeachment evidence in this case would have in reasonable probability produced a different result.

1. The Court of Appeals ignores the strength of the State's case.

Amy was 18 years old when she testified. [RR 12:41]. Amy provided detailed and graphic testimony of Appellant's sexual assaults, which included descriptions of oral sex, intercourse, digital penetration, and fondling that occurred in her bedroom, the living room, and the computer room of her house. [RR 12:60-64, 70-75, 79, 92-94]. She also testified about how Appellant sexually abused her in a hotel room at a Motel 6 where she was staying with him. [RR 12:93-94]. In addition, she testified extensively about Appellant's "grooming" activities. [RR 12:6-60].

Kim testified about Appellant's grossly inappropriate behavior of buying both Rita and Amy lingerie (at a time when Amy was 12 years old and Rita was 14 or 15 years old). [RR 11:115-16]. She testified that Appellant would have Amy come outside and sit in his truck with him at 1:00 or 2:00 a.m. on school nights, and that Amy would get in the truck wearing just a robe. [RR 11:117]. Kim also testified that when Appellant and Amy would spend the night at Appellant's sister's house, Amy would sleep in the same bed with Appellant. [RR 11:118].

The foregoing is incredibly strong evidence that supports the jury's findings. In a case involving sexual assault of a child by her father, the fact that: (1) the father is buying his young daughters lingerie, (2) the father is spending nights in a hotel

room with his minor daughter, and (3) the father is summoning his daughter to spend time with him in his truck late at night on a school night while she is wearing only a robe, are all egregious facts supporting a guilty verdict.

Moreover, the Court of Appeals fails to account for the evidence at trial disputing Appellant's theory that Kim "coached" Rita and Amy. Sandra Torrence, a qualified forensic interviewer with Alliance for Children, stated she had no concerns whatsoever that Amy or Rita were "coached." [RR 12:133-34].[9] Similarly, Teresa Fugate, a sexual assault nurse examiner ("SANE") at Cook Children's Medical Center conducted a sexual assault exam on Amy. [RR 11:273]. Fugate's report/testimony revealed that Amy told her virtually identical facts that matched Amy's trial testimony, including the nature of the sexual assaults and the locations in the home and a motel where they occurred. [RR 11:273-78]. Viewing all these facts in the context of a *Brady* "materiality" analysis, any reasonable person would view these facts as strengthening the State's case, providing credibility to Amy's testimony, and supporting the jury's guilty verdict.

[9] The Fort Worth Court of Appeals' treatment of Rita as not credible is not supported by the record. *See Hallman*, 2020 WL 2201908, at *17 n.18. Rita was only a part of Count One – the continuous sexual assault of a child offense. [CR 227-40]. All the individual counts charged dealt solely with Amy as the victim. [CR 227-40]. Because there are several elements to a continuous sexual assault offense, the jury's "not guilty" verdict does not imply that the jury found Rita to be not credible as to her testimony regarding the individual offenses comprising the continuous charge. *See Mohler v. State*, No. 02-15-00024-CR, 2016 WL 544066, at *2 (Tex. App.—Fort Worth Sept. 29, 2016, pet. ref'd) (mem. op., not designated for publication) (recognizing that a finding of not guilty as to continuous does not preclude a guilty finding as to individual offenses).

But the Fort Worth Court of Appeals never expressed any such sentiment in their materiality analysis. *Hallman*, 2020 WL 2201908, at *13. Instead, the Court of Appeals essentially dismissed these facts by pointing out that Kim was impeached on whether she called the police regarding these matters. *Id.* at *14. This is a non-sequitur. The Court of Appeals gives undue weight to the potential impeachment of Kim with her handwritten statement regarding an extraneous offense that happened two years before any outcry, holding that such impeachment "might have tipped the balance" such that the jury would have ignored the egregious facts listed above and voted to acquit.

2. Comparing the impeachment of Kim that might have occurred with the impeachment that actually occurred forecloses any conclusion that, had the evidence been disclosed, the jury, in reasonable probability, would have voted to acquit.

At trial, Kim testified that she told the responding officers at the time of the August 10, 2014, incident that she suspected Appellant was sexually abusing Amy. [RR 11:201-05]. It is this single testimonial statement, and Appellant's inability to impeach this testimony with Kim's handwritten statement, upon which the Fort Worth Court of Appeals bases its reversal. This begs the question: If Kim's handwritten statement had been disclosed and Appellant had been able to impeach Kim with it, would there, in reasonable probability, have been a different outcome? In making this determination, it is necessary to weigh and compare what might have

been (i.e., direct impeachment of Kim using her handwritten statement) with the impeachment of Kim that did in fact occur.[10]

To the extent there is a gap between (1) the effectiveness of impeaching Kim with her own handwritten statement about the August 10, 2014, incident, and (2) the effectiveness of Appellant's impeachment of Kim's testimony through Officer Robles, that gap is *de minimis*. And, in light of the evidence of guilt, that gap is certainly not significant enough for the Court of Appeals to conclude that had Kim's handwritten statement been disclosed that it would have, in reasonable probability, resulted in the jury acquitting Appellant.

The problem with the Court of Appeals' analysis is that it discounts the value of the impeachment that actually did occur. As this Court held in *Wyatt v. State*, the materiality of undisclosed evidence is significantly diminished when the same impeachment is able to be accomplished through other means. 23 S.W.3d 18, 27 (Tex. Crim. App. 2000) (evidence was not material because witness's testimony was

[10] There is a reasonable argument to be made that impeaching a witness with that witness's own handwritten statement is more effective than other methods of impeachment. However, one could also make the counter-argument (based on the record herein) that calling a police officer to the stand to directly refute Kim's testimony is equally, if not more, powerful and effective impeachment. Of course, how the direct impeachment of Kim with her own handwritten statement would have played out is theoretical. But one can easily imagine Kim's response to being confronted with her handwritten statement to be, "I did not write down my suspicions about sexual assault because the officer wanted me to write a statement about the August 10, 2014, assault that had just occurred." This theory is actually supported by the witness statement form which states that the witness's statements "are and will be the same statements I would make during the presentation ***of this case*** in a court of law. [RR 19:State's Ex. 38 (emphasis added)].

substantially the same as the undisclosed evidence and therefore defense was able to cross examine the witness on the same subject matter); *see Saldivar v. State*, 908 S.W.2d 475, 486 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd) (holding that while defendant could have offered witness's theft conviction, if disclosed, to impeach her credibility with jurors, witness's inconsistent statements permitted defendant "to accomplish the same goal on cross-examination"). Kim was in fact successfully impeached *on the same issue* raised by her handwritten statement through Officer Robles' testimony. The Court of Appeals' analysis presumes that had the jury heard a hypothetical impeachment through Kim's handwritten statement in place of, or in addition to, the actual impeachment through Officer Robles, there was a possibility that the outcome of the guilt/innocence phase of trial might have been different. This cannot be the case, and the Court of Appeals provides no justification for why it would be. *See Ex parte Lalonde*, 570 S.W.3d 716, 723 (Tex. Crim. App. 2019); *Harm v. State*, 183 S.W.3d 403, 409 (Tex. Crim. App. 2006).

Ultimately, there is not such a vast disparity between the effectiveness of the impeachment that *did occur*, and the effectiveness of the impeachment that *could have occurred*, that it was outcome determinative. Thus, because the Court of Appeals deviated from this Court's and the United States Supreme Court's applicable decisions in applying the materiality prong under *Brady*, review is warranted under Texas Rule of Appellate Procedure 66.3(f).

CONCLUSION AND PRAYER

The Fort Worth Court of Appeals has diverged significantly from the accepted standards in analyzing an alleged *Brady* violation, and its decision in this case conflicts with established precedent from this Court and the United States Supreme Court. Thus, review is warranted under Texas Rule of Appellate Procedure 66.3(c) and (f). The State prays that this Court grant its petition for discretionary review, and after full briefing on the merits, reverse the lower appellate court's judgment, and affirm the trial court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i) because it contains 4,188 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1), as computed by the computer software used to prepare the document.

/s/ SHELBY J. WHITE
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CERTIFICATE OF SERVICE

On the 27th day of July, 2020, a true copy of the State's petition for discretionary review has been e-served on the parties below:

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From the Court of Appeals for the Second District of Texas
02-18-00434-CR
Appeal in Cause No. 1548964R in Criminal District Court No. 1 of Tarrant County, Texas, the Hon. Sheila Wynn presiding over voir dire; the Hon. Keith Dean presiding over guilt/innocence; the Hon. Elizabeth Beach presiding over pretrial and punishment

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APPENDIX

App. A: Court of Appeals' Opinion in *Hallman v. State*, --S.W.3d--, No. 02-18-00434-CR, 2020 WL 2201908 (Tex. App.—Fort Worth May 7, 2020)

App. A

2020 WL 2201908
Only the Westlaw citation is currently available.

Court of Appeals of Texas, Fort Worth.

Robert F. HALLMAN, Appellant
v.
The STATE of Texas

No. 02-18-00434-CR
|
Delivered: May 7, 2020

On Appeal from Criminal District Court No. 1, Tarrant County, Texas, Trial Court No. 1548964R, HON. ELIZABETH BEACH, Judge

Attorneys and Law Firms

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ATTORNEY FOR STATE: JOSEPH W. SPENCE, CHIEF, POST CONVICTION, SHELBY J. WHITE, ASHLEA DEENER, SAMANTHA FANT, ASST. CRIM. DIST. ATTYS., FORT WORTH, TX.

Before Sudderth, C.J.; Gabriel and Wallach, JJ.

OPINION

Opinion by Chief Justice Sudderth

I. Introduction

***1** Appellant Robert F. Hallman was indicted on one count of continuous sexual abuse of children (Amy and Rita).[1] He was also indicted on two counts of aggravated sexual assault of a child under the age of 14, three counts of indecency with a child by contact, and one count of sexual assault of a child under the age of 17, but these charges involved only Amy.

Before trial, the State provided Hallman's defense counsel with a two-page notice of disclosure pursuant to Texas Code of Criminal Procedure Article 39.14 that did not include 13 pages of discovery regarding a separate August 10, 2014 incident between Hallman and Kim, who is Amy and Rita's mother and was a key witness for the State.[2] Several witnesses testified about the August 10 incident during the guilt-innocence phase of trial, but the 13 pages were not disclosed to Hallman's defense counsel until the second day of the punishment phase of the trial, after the jury had acquitted him of the continuous-sexual-abuse count but convicted him of all of the remaining counts.

Hallman moved for a mistrial on the untimely disclosure. After the trial court denied Hallman's mistrial request, the jury assessed his punishment for each of the six counts at life imprisonment, and the trial court set those sentences to run concurrently.

In a single point, Hallman argues that the trial court abused its discretion by denying his request for a mistrial, complaining that the State violated Article 39.14's discovery requirements. We agree and therefore sustain Hallman's sole point, reverse the trial court's judgment, and remand the case for a new trial.

II. Background

A. Timeline

Hallman lived off-and-on with his wife Kim and the children —Rita, Amy, their younger brother Ron, and their younger sister Kelly—until August 2014. During Hallman and Kim's tumultuous 20-year relationship, they took turns calling the police on each other.

In 2016, Amy moved out and lived with Hallman in his vehicle. Not long thereafter, Rita made a delayed outcry of sexual abuse by Hallman, resulting in Hallman's arrest and Amy's return to Kim. Kim then filed for a divorce from Hallman, which was finalized on September 9, 2016. Prior to Hallman's original trial date on Rita's allegations, Amy made a delayed outcry of sexual abuse by Hallman, resulting in the trial's delay.

B. Testimony about the August 10, 2014 Incident during Guilt-Innocence

During the guilt-innocence phase of Hallman's trial, five witnesses were called to testify about the August 10 incident —Rita, Amy, Kim, the detective assigned to investigate the sexual abuse case, and one of the two officers who

responded to the August 10 call. Depending upon which witness testimony is believed, the incident began either when Amy tried to leave with Hallman and Kim tried to stop her, or when Hallman hit Ron, Amy and Rita's younger brother. While the facts surrounding the incident provided the jury with insight into Hallman's relationship with Kim, Amy, and Rita, on appeal we will focus primarily on Kim's statement to the police and specifically whether she had mentioned her concerns that Hallman was sexually abusing Amy.

***2** Fort Worth Police Sergeant Jonathan McKee, who investigated the sexual abuse allegations two years later, testified that on August 10, Rita had called the police to report the domestic disturbance and that Hallman was arrested as a result of that call.

Rita said that she had called the police that day because Hallman and Kim had gotten into an argument and had started fighting after Hallman hit Ron. Amy said that the altercation between Hallman and Kim began because Amy had wanted to leave with Hallman, and when Kim had grabbed her in a way that cut off her air supply, Hallman had tried to defend her.

Kim stated that Rita and Ron had each called the police to report that Hallman was assaulting her, that she had "told the police on August the 10th, 2014, that [she] had suspicions that [Hallman] may have been sexually molesting [Amy]," and that an officer had pulled Amy aside separately and spoke with her.

But Amy said that while she "[p]ossibly" or "probably" told the police that Kim had grabbed her in a way that kept her from being able to breathe, when she spoke with a CPS worker that day, she told the CPS worker "no" when asked if anyone had ever sexually abused her. Amy acknowledged that while Kim had been furious when Amy called Hallman to come get her, Kim had said nothing about being afraid that he was going to sexually abuse her. Rita also recalled speaking with the CPS worker and acknowledged that when the CPS worker asked her if anyone had ever touched her inappropriately, she had said, "No."

Crowley Police Detective Cesar Robles, who had worked for the Fort Worth Police Department on August 10, 2014, was called by the defense and testified that he was one of the two patrol officers who responded to the domestic disturbance call that day. He stated that Kim never told him or the other responding officer, Officer Oakley, that she was concerned that one of her children was being sexually abused and that if she had, they would have investigated further.

During cross-examination by the prosecutor, Detective Robles testified that he had no independent recollection about the incident except for his report. He did not remember what Amy, Kim, or Hallman looked like, and he did not recall whether they had been emotional. When asked whether in responding to the domestic disturbance, he would have gone over to any of the children involved and asked whether Hallman had touched them, Detective Robles replied, "No, ma'am," and agreed that such questioning would not have been appropriate. On redirect examination by the defense, Detective Robles agreed that Kim never mentioned concerns about sexual abuse. Officer Oakley was not called as a witness.

C. Disclosure during Punishment Phase

During the second day of the punishment phase of trial, Hallman's defense counsel notified the trial judge, who had not presided over the guilt-innocence phase of the trial, that the State had just disclosed new information to the defense, stating,

> [F]or the record, we filed a 39.14 motion for discovery of all offense reports. And just this morning, about five minutes ago, all it took was the State to electronically make this discovery available. And I received 13 pages of discovery we've never seen before dealing with the August 10th, 2014, incident, which the Court doesn't know, but it's been litigated throughout this trial.
>
> ***3** Among these records include a family violence packet we've never seen before. Among these records include an affidavit by C. Robles who has testified in this case, who we called and had no idea he provided an affidavit in connection with this case. Among these records include a statement by [Kim], one of the primary witnesses of the State, that we've never seen before in connection for this.
>
> .... And our client gave a statement in connection with the 2014 offense that we've never seen before and have never been provided. That is a violation of 39.14, Judge.
>
> ....
>
> ... We have made strategic decisions based upon the state of discovery that we received, and we have done so to our detriment because this information has not been provided to us, Judge.

> We don't have to specifically name which items we are entitled to because we don't know what the State has, and that's why we asked for everything. This isn't even gray. This is our client's statement. This is [Kim's] statement. This is a primary witness by the State that we've never been given this information of.
>
> ....
>
> And not only that, Your Honor, just now in looking at [Kim's] statement, there are inconsistencies with her testimony. So we were not allowed to question her. And her credibility -- our whole Defense was that it was the mother who put these children up to making these statements. And anything we could do to impeach her credibility was crucial to this case. And I'm looking at the statement and seeing that there are inconsistencies with her testimony.
>
> So it is crucially relevant to this, despite the fact that it involved a separate offense. The -- 38.37 allows them to go into the entire relationship between the defendant and the alleged victims, and that was a crucial part.

The prosecutor agreed that the August 10 offense had been litigated during the guilt-innocence phase of trial even though it was a separate offense. The prosecutor also stated,

> [W]e have had so many different hearings on discovery in this case. I am trying to comply and give them everything that I possibly can. I ... when we have access to it, yes, it exists on TSP [the electronic discovery system]. They asked for the offense report. I made sure that they had the offense report. We -- they have asked for numerous things. [3] It was my understanding that they have already subpoenaed all this stuff from Fort Worth Police Department because we had a discovery hearing months ago where they had issued two, three, five different subpoenas for all these records. So I actually thought Defense had more than we actually had in this case. [4]
>
> But we're not trying to hide anything. This is dealing with a 2014 report. They specifically asked for the offense report. We've given that report over to them. This is an – they've asked for the family violence packet now. This is an eight-page family violence packet. I think if the remedy is for 39.14, if they feel that this is something they need to go into, then how much time do they need to go through for an eight-page report? I mean, I just – Your Honor knows because you've been a part of this case for the last two years. I am trying to be as transparent and give them everything that I can.

***4** The trial court then ordered a two-hour recess so that the defense could review the new materials and stated that the defense would be allowed to recall any witnesses it felt necessary, including Kim, to conduct cross-examination based on the newly disclosed information. Defense counsel pointed out to the judge that the relevant cross-examination should have taken place during guilt-innocence, not during punishment, and requested a mistrial; the trial court replied that a request for mistrial was premature, adding,

> But if after you have reviewed those documents and if you feel like you need to recall [Kim], and we can even do that outside the presence of the jury, to see what her testimony would have been if she'd been cross-examined based upon that statement, at that time if you need to move for a mistrial, you may do that and the Court will address it.

At the conclusion of the two-hour recess, the prosecutor informed the trial court that the defense had requested the family violence packet listed on the 2014 offense report that morning and that some of the previously undisclosed materials—a written statement by Kim and a written statement by Hallman—were "copy and pasted verbatim" into Detective Robles's August 10, 2014 offense report, which defense counsel had and used during the trial's guilt-innocence phase. [5]

1. Detective Robles's August 10, 2014 Offense Report

The narrative in Detective Robles's August 10 offense report, which the parties used but did not offer into evidence during the guilt-innocence phase of the trial, stated that the 911 call details were that Kim and Ron had been hit in the face. Hallman told then-Fort Worth Police Officer Robles that Amy had wanted to leave with him and that Kim had followed them outside, grabbed Amy, and told her that she was not going anywhere and to go back inside the house. Amy told Hallman that she could not breathe, and Hallman grabbed Kim and tried to pull her away from Amy; he denied having hit Kim or anyone else in the process.

According to the report narrative, Kim told Officer Oakley that Amy had tried to go with Hallman to a residence where narcotics were being used and that she told Amy she could not go and grabbed her by the arm. After Hallman punched her right arm and twisted her arm behind her back, Kim used her left arm to hit him in the head, and when Ron saw what was going on, he ran up and bit Hallman on the back. Kim told Officer Oakley that Hallman hit Ron in the face and the stomach. When Officer Oakley spoke with a neighbor, the neighbor told him that Hallman and Kim had been arguing in the street "as they always do," Hallman hit Kim on her arm and twisted her arm behind her back, and Ron came up and did something to Hallman's back. Hallman then "threw his arm back, and it was unclear if there was any contact made to [Ron] or not."

According to the report's narrative, Kelly, Amy and Rita's younger sister, gave the same account to the police as Kim, while Amy gave the same account as Hallman, but when asked for more details, Amy "got upset and went inside the residence." The report stated, "When [Hallman] was given his chance to write his statement, he advised that [Ron] did bite him, but he did not hit [Ron] unless it was by accident."

2. The Undisclosed Written Statements and Affidavit

***5** Hallman's handwritten statement set out the following,

> Prior to having [Rita] call the police I made every effort to get away from [Kim] by going next door to my nei[ghbor's] house to wait on my sister to pick [up] me and ... [Amy], [Kim] followed us next door and beg[a]n to grab on me and then grab on ... [Amy] and she started having an asthma attack saying she couldn't breathe[.] I beg[a]n to pull [Kim] to free [Amy] so she could breathe[.] In the process [Ron] bit me in the back, he's eight no big deal but I did not strike [Ron] [;] because of all the wrestling he got bumped but not struck by me intentionally to harm him.

Kim's handwritten statement set out the following,

> This morning [Amy] was trying to leave with [Hallman] to go with him to his sister['s] house to smoke marijuana openly[.] I refused to let he[r] go in that environment with him. [Hallman] told her to run away. I went after her to the neighbor[']s house and asked her to come back home and I took her by her arm at the wrist and tried to pull her back and that's when Mr. Hallman hit me in my right arm and twisted my arms behind my back and when [Ron] seen him hit me h[e] tried to protect me and bit him and in return Mr. Hallman hit him in the face and stomach[.]

Detective Robles's affidavit contained the same information as his offense report. The offense report and Hallman's and Kim's statements were admitted for record purposes as State's Exhibits 36, 37, and 38. These items, along with the family violence packet—which included a request for an emergency protective order—were admitted for record purposes as Defense Exhibit 28. The family violence packet includes the instruction, "If the officer feels like the situation is detrimental to the children in the home, the officer should make a report to CPS." Kim and Ron were listed as victims; Rita, Amy, Ron, and Kelly were listed as children who had seen the incident and were interviewed. Rita's, Amy's, and Kelly's demeanors were check-marked as "calm." Defense Exhibit 28 also contained Hallman's jail paperwork listing the charged offenses arising out of the August 10 incident as assault-bodily injury to a family member and injury to a child.

3. Arguments and Requested Relief

The defense argued that it had put on Detective Robles's testimony "believing that the only information he had was contained in his offense report," that a large part of the case centered on Kim's credibility, and that if it had had Kim's written statement to the police that did not mention sexual abuse—contrary to her claim that she had expressed her concerns to the officers—Hallman would have had "a far different cross-examination" of her. The defense again requested a mistrial, stating that the State's failure to disclose under Article 39.14 affected Hallman's trial strategy, including defense counsel's recommendation not to

testify during guilt-innocence, and infringed on the defense's ability to effectively cross-examine Kim, Amy, and Detective Robles.

The defense requested, in the alternative, that the trial court allow the visiting judge who heard the guilt-innocence phase to preside or to grant a continuance for the trial judge to review the pertinent portions of the trial record. The defense did not file a sworn, written motion for continuance or recall Kim or any other witness outside the jury's presence to demonstrate what impeachment with the recently disclosed materials could have shown.

4. Trial Court's Ruling

***6** The trial court denied the defense's requests, observing that after comparing the information contained in Detective Robles's offense report to Hallman's and Kim's written statements, "the essential information from those two statements is contained" in the offense report. The trial court elaborated by stating,

> [T]he Court has reviewed State's Exhibits 36 and 37 and 38. And for the record, all of these pertain to an extraneous offense, not the offense that the defendant is being tried for in this trial, but an extraneous offense from August 12th, 2014. And in that offense, the victim is [Kim] not the two victims in this case.
>
> And the Court has further reviewed what is contained in the report by the officer in State's Exhibit 36 and compared that to the written statements of Robert Hallman in State's Exhibit 37 and [Kim] in State's Exhibit 38. And the essential information from those two statements is contained on Page 4 of State's Exhibit 36.
>
> So the Court rules that for purposes of 39.14, that State's Exhibits 37 and 38 are not material in that their omission would not create a reasonable doubt that did not otherwise exist.
>
> ....
>
> So your motion for a mistrial is denied, and your motion for a continuance is denied.

When defense counsel urged reconsideration, the trial court responded, "And, once again, the Court is not ruling that everything contained in State's Exhibit 36 is not relevant and not material, but the Court is merely ruling that there is not additional information in State's Exhibits 37 and 38 that are not contained in State's Exhibit 36, and that is the Court's ruling." Hallman did not file a motion for new trial or file a formal bill of exception. *See* Tex. R. App. P. 21.2, 33.2.

III. Discussion

Hallman argues in his sole point that the trial court abused its discretion by denying his motion for mistrial because the State violated Article 39.14's discovery requirements.[6] The State responds that any failure to timely disclose was harmless because the evidence was not "material."

A. Standard of Review

We review the denial of a motion for mistrial for an abuse of discretion, meaning that we must uphold the trial court's ruling if it was within the zone of reasonable disagreement. *Archie v. State*, 221 S.W.3d 695, 699–700 (Tex. Crim. App. 2007); *Marchbanks v. State*, 341 S.W.3d 559, 561 (Tex. App.—Fort Worth 2011, no pet.). Only in extreme cases, when the prejudice is incurable, will a mistrial be required. *Marchbanks*, 341 S.W.3d at 561, 563 (reviewing *Brady* complaint). Generally, in determining whether a trial court abused its discretion by denying a mistrial, we balance three factors: (1) the severity of the misconduct (prejudicial effect); (2) curative measures; and (3) the certainty of conviction or the punishment assessed absent the misconduct. *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004); *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998) (op. on reh'g).

***7** But we will not apply these factors here because the disclosure requirements under Article 39.14 parallel those under *Brady* and the policies that underlie it. And *Brady* violations are treated differently. *See Kyles v. Whitley*, 514 U.S. 419, 435, 115 S. Ct. 1555, 1566 (1995) (explaining that a reasonable probability that the undisclosed evidence would have resulted in a different outcome necessarily entails the conclusion that the suppression must have had a substantial and injurious effect or influence in determining the jury's verdict); *Hampton v. State*, 86 S.W.3d 603, 612 (Tex. Crim. App. 2002) (stating that *Brady*'s three-prong test for reversible error is entirely different from Texas Rule of Appellate Procedure 44.2(a)'s constitutional harmless error standard).

To establish reversible error based on a *Brady* violation, an appellant must meet a three-prong test: (1) that the State failed to disclose evidence, regardless of the prosecution's good

or bad faith; (2) that the withheld evidence is favorable to him; and (3) that the evidence is material in that there is a reasonable probability that had the evidence been disclosed, the trial's outcome would have been different. *See* Pena v. State, 353 S.W.3d 797, 809 (Tex. Crim. App. 2011) (setting out *Brady* three-prong test). The remedy for a *Brady* violation is a new trial. *Ex Parte Miles*, 359 S.W.3d 647, 664 (Tex. Crim. App. 2012).

We will apply the *Brady* three-prong test in our analysis of Hallman's Article 39.14-based complaint. *See* Branum v. State, 535 S.W.3d 217, 224–25 (Tex. App.—Fort Worth 2017, no pet.); *see also* Ray v. State, No. 10-17-00394-CR, 2018 WL 4926215, at *5–6 (Tex. App.—Waco Oct. 10, 2018, pet. ref'd) (mem. op., not designated for publication) (considering *Brady* and Article 39.14 claims together but holding that failure to request a continuance waived any alleged violation under either).

B. Preservation of Error

We observe at the outset that there is an unraised issue of whether a motion for continuance that complies with the Texas Code of Criminal Procedure's requirements—i.e., that it be in writing and sworn—is required to preserve an Article 39.14 complaint. *See* Ray, 2018 WL 4926215, at *7 n.3 (Gray, C.J., concurring) (setting out steps a careful attorney should take "[u]ntil the issue of whether a formal motion for continuance is necessary to preserve an issue regarding whether the State failed to comply with disclosure under article 39.14" is decided); Prince v. State, 499 S.W.3d 116, 121 (Tex. App.—San Antonio 2016, no pet.) (holding that by failing to file a sworn, written motion for continuance, the appellant failed to preserve error on his Article 39.14 or *Brady* complaints upon which his denial-of-continuance argument was based but addressing appellant's denial-of-mistrial complaint separately); *Apolinar v. State*, 106 S.W.3d 407, 421 (Tex. App.—Houston [1st Dist.] 2003) ("When evidence withheld in violation of *Brady* is disclosed at trial, the defendant's failure to request a continuance waives the error or at least indicates that the delay in receiving the evidence was not truly prejudicial."), *aff'd on other grounds*, 155 S.W.3d 184 (Tex. Crim. App. 2005); *see also* Ahn v. State, No. 02-17-00004-CR, 2017 WL 6047670, at *6 n.4 (Tex. App.—Fort Worth Dec. 7, 2017, no pet.) (mem. op., not designated for publication) ("[T]o preserve a *Brady* complaint when *Brady* evidence is disclosed at trial, a defendant generally must request a continuance."). Because error preservation is a systemic requirement, we must independently review this unraised issue; we have a duty to ensure that a claim is properly preserved in the trial court before we address its merits. *Darcy v. State*, 488 S.W.3d 325, 327–28 (Tex. Crim. App. 2016).

***8** The record reflects that Hallman moved for a mistrial on the basis of Article 39.14 regarding the undisclosed evidence and moved, in the alternative and on the same basis, for a continuance but did not file a written, sworn motion for that continuance. The trial court granted Hallman two hours to review the undisclosed 13 pages. Hallman complains only of the denial of his motion for mistrial on appeal.

We find some of the reasoning in the concurring opinion in *Ray* helpful to our error-preservation determination here. In the concurrence to *Ray*, Chief Justice Gray noted that a request for a continuance requires certain procedural requirements "that are simply not present in a motion for mistrial" and that a defendant should not be required to seek a continuance as a prerequisite to preserve error as to the denial of a mistrial when the State has failed to comply with statutorily required discovery. *Ray* 2018 WL 4926215, at *7 (Gray, C.J., concurring). That is, the denial of the motion for mistrial should be sufficient when the defendant has obtained an adverse ruling from the trial court for the relief requested, per Texas Rule of Appellate Procedure 33.1, and "it should not be the defendant's burden to properly request a continuance and thus convert the issue from a failure to grant a mistrial to a failure to grant a continuance." *Id.* at *7 & n.3. We agree, particularly under the circumstances here, under which the granting of a continuance would not have allowed the defense to revisit the relevant guilt-innocence portion of trial to prepare and adjust any trial strategies. *See* Little v. State, 991 S.W.2d 864, 867 (Tex. Crim. App. 1999) (explaining that to prevail under *Brady*, a defendant must show not only a failure to timely disclose favorable evidence but also that he was prejudiced by the tardy disclosure).

We hold that when an oral motion for continuance is made on the same Article 39.14 basis as a motion for mistrial, the trial court rules on both, and a continuance would serve no useful purpose, a defendant does not need to file a written, sworn motion for continuance in order to preserve his Article 39.14-based denial-of-mistrial complaint for our review. *Cf.* *Branum*, 535 S.W.3d at 226–27. [7]

C. Texas Code of Criminal Procedure Article 39.14, Branum, and Watkins

***9** The Legislature passed the Michael Morton Act to make criminal prosecutions more transparent by ensuring that criminal defendants can review many of the State's discovery materials above and beyond those that are purely exculpatory. *Love v. State*, No. 02-19-00052-CR, 2020 WL 1466311, at *1 (Tex. App.—Fort Worth Mar. 26, 2020, no pet. h.); *see* Gerald S. Reamey, *The Truth Might Set You Free: How the Michael Morton Act Could Fundamentally Change Texas Criminal Discovery, or Not*, 48 Tex. Tech L. Rev. 893, 897 (2016) ("Prior to 2014, Texas discovery law ... inhibited the ability of the criminally accused to obtain useful material from the [S]tate in a timely fashion."). That is, the Act's purpose is to reduce the risk of wrongful conviction, which is high when criminal defendants "are systematically denied information about the [S]tate's case until it is revealed at trial." Reamey, 48 Tex. Tech. L. Rev. at 899–900 (explaining that after serving almost 25 years of a life sentence, Morton was exonerated by evidence that had previously been undisclosed due to prosecutorial misconduct).

Accordingly, in 2013, when the Texas Legislature unanimously passed the Act, it dramatically expanded the scope of discovery provided for in Texas Code of Criminal Procedure Article 39.14. *See* Act of May 14, 2013, 83rd Leg., R.S., ch. 49, § 2, 2013 Tex. Gen. Laws 106, 106–07; *see also Branum*, 535 S.W.3d at 224 ("Article 39.14 is a comprehensive discovery statute that provides limited authorization for a trial court to order discovery....").

Before the 2013 amendments, Article 39.14(a) provided that if the defendant filed a motion showing good cause, the trial court was required to order the State before or during trial to produce documents designated in the motion, including the defendant's written statement (but not written statements of witnesses or work product) as long as those documents contained evidence material to any matter involved in the action that was in the State's possession, custody, or control, as set out in full below:

> Upon motion of the defendant showing good cause therefor and upon notice to the other parties, except as provided by Article 39.15, the court in which an action is pending shall order the State before or during trial of a criminal action therein pending or on trial to produce and permit the inspection and copying or photographing by or on behalf of the defendant of any designated documents, papers, written statement of the defendant, (except written statements of witnesses and except the work product of counsel in the case and their investigators and their notes or report), books, accounts, letters, photographs, objects or tangible things not privileged, which constitute or contain evidence material to any matter involved in the action and which are in the possession, custody or control of the State or any of its agencies. The order shall specify the time, place and manner of making the inspection and taking the copies and photographs of any of the aforementioned documents or tangible evidence; provided, however, that the rights herein granted shall not extend to written communications between the State or any of its agents or representatives or employees. Nothing in this Act shall authorize the removal of such evidence from the possession of the State, and any inspection shall be in the presence of a representative of the State.

Act of May 18, 2009, 81st Leg., R.S., ch. 276, § 2, 2009 Tex. Gen. Laws 732, 733 (amended 2013).

After the 2013 amendments, which became effective on January 1, 2014, Article 39.14(a) provided that as soon as practicable upon a timely request from the defense, the State had to produce any offense reports and any written or recorded statements of the defendant or of a witness, in addition to any designated documents (excluding work product) that contained evidence material to any matter involved in the action and in the State's possession, custody, or control, as set out in full below:

> ***10** Subject to the restrictions provided by Section 264.408, Family Code, and Article 39.15 of this code, as soon as practicable after receiving a timely request from the

> defendant the state shall produce and permit the inspection and the electronic duplication, copying, and photographing, by or on behalf of the defendant, of any offense reports, any designated documents, papers, written or recorded statements of the defendant or a witness, including witness statements of law enforcement officers but not including the work product of counsel for the state in the case and their investigators and their notes or report, or any designated books, accounts, letters, photographs, or objects or other tangible things not otherwise privileged that constitute or contain evidence material to any matter involved in the action and that are in the possession, custody, or control of the state or any person under contract with the state. The state may provide to the defendant electronic duplicates of any documents or other information described by this article. The rights granted to the defendant under this article do not extend to written communications between the state and an agent, representative, or employee of the state. This article does not authorize the removal of the documents, items, or information from the possession of the state, and any inspection shall be in the presence of a representative of the state.

Tex. Code Crim. Proc. Ann. art. 39.14(a).

The amendments also added twelve new subsections, two of which—subsections (h) and (k)—are also pertinent to the issue before us. *See id.* art. 39.14(h), (k). Subsection (h), a codified *Brady* provision, states, "Notwithstanding any other provision of this article, the state shall disclose to the defendant any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged." *Id.* art. 39.14(h). Subsection (k), which requires ongoing disclosure, states, "If at any time before, during, or after trial the state discovers any additional document, item, or information required to be disclosed under Subsection (h), the state shall promptly disclose the existence of the document, item, or information to the defendant or the court." *Id.* art. 39.14(k).

The recent changes to Article 39.14 create a general, continuous duty by the State to disclose before, during, or after trial any discovery evidence that tends to negate the defendant's guilt or to reduce the punishment he could receive. *Ex parte Martinez*, 560 S.W.3d 681, 702 (Tex. App.—San Antonio 2018, pet. ref'd); Cynthia E. Hujar Orr & Robert G. Rodery, *The Michael Morton Act: Minimizing Prosecutorial Misconduct*, 46 St. Mary's L.J. 407, 414 (2015) (stating that "for the first time, the prosecution is under a statutory duty to *continually* disclose exculpatory evidence").

The Michael Morton Act is essentially a state statutory extension of *Brady*, in which the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87, 83 S. Ct. at 1196–97 (observing that society wins not only when the guilty are convicted but also when criminal trials are fair and that our judicial system suffers when any accused is treated unfairly); *see United States v. Agurs*, 427 U.S. 97, 104, 96 S. Ct. 2392, 2398 (1976) ("A fair analysis of the holding in Brady indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial."); [8] *Pena v. State*, 353 S.W.3d 797, 809 (Tex. Crim. App. 2011) ("*Brady* essentially created a federal constitutional right to certain minimal discovery.").

***11** By instituting what amounts to a legislative "Open File" policy in advance of trial, the Michael Morton Act sets out a methodology to enhance the fairness of the trial process and to prevent wrongful convictions by giving the defense access to information the existence of which it might otherwise have to guess. *See generally Ex parte Temple*, No. WR-78,545-02, 2016 WL 6903758, at *3 n.20 (Tex. Crim. App. Nov. 23, 2016) (not designated for publication) (recognizing that "[t]he Michael Morton Act created a general, ongoing discovery duty of the State to disclose before, during, or after trial any evidence tending to negate the guilt of the defendant or reduce the punishment the defendant could receive"); [9] *Young v. State*, 591 S.W.3d 579, 598 (Tex. App.—Austin 2019, pet. ref'd) ("When the [L]egislature passed the Michael

Morton Act, it amended article 39.14 of the Code of Criminal Procedure to expand the availability and scope of discovery that must be produced by the State."); *Murray v. State*, No. 08-16-00185-CR, 2018 WL 1663882, at *4 (Tex. App.—El Paso Apr. 6, 2018, pet. ref'd) (mem. op., not designated for publication) ("The Michael Morton Act changed Texas law related to discovery in criminal cases in order to prevent wrongful convictions by ensuring defendants have access to the evidence in the State's possession so they may prepare a defense."). *But see Agurs*, 427 U.S. at 111, 96 S. Ct. at 2401 (rejecting suggestion that prosecutor has a constitutional duty to deliver his entire file to defense counsel).

"Favorable evidence" includes both exculpatory evidence and impeachment evidence. *Chaney*, 563 S.W.3d at 266; *see Strickler*, 527 U.S. at 280, 119 S. Ct. at 1948 ("We have since held ... that the [*Brady*] duty encompasses impeachment evidence as well as exculpatory evidence."); *see also Kyles*, 514 U.S. at 437, 115 S. Ct. at 1567 ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."). Impeachment evidence is evidence that "disputes, disparages, denies, or contradicts other evidence." *Chaney*, 563 S.W.3d at 266. But materiality, a legal question that we review de novo, remains the linchpin of both Article 39.14(a) and *Brady*. *See* Tex. Code Crim. Proc. Ann. art. 39.14(a); *Chaney*, 563 S.W.3d at 264; *see also Strickler*, 527 U.S. at 282, 119 S. Ct. at 1948.

"To establish that requested evidence is material, a defendant must provide more than a possibility that it would help the defense or affect the trial." *Branum*, 535 S.W.3d at 224. That is, to be considered material and subject to mandatory disclosure under Article 39.14(a), such evidence must be indispensable to the State's case or must provide a reasonable probability that its production would result in a different outcome. *Id.* at 225; *see Ehrke v. State*, 459 S.W.3d 606, 611 (Tex. Crim. App. 2015) ("Evidence is material if its omission would create 'a reasonable doubt that did not otherwise exist....' " (quoting *Agurs*, 427 U.S. at 112, 96 S. Ct. at 2402)); *see also Chaney*, 563 S.W.3d at 263–64, 266 (stating that false evidence is material when there is a "reasonable likelihood" that it would have affected the jury's judgment and that suppressed evidence is material if there is a reasonable probability that the trial's result would have been different if the suppressed evidence had been disclosed to the defense). "A reasonable probability is one sufficient to undermine confidence in the outcome of the trial." *Chaney*, 563 S.W.3d at 266; *see Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) (stating, under *Brady*, that the defendant need not show that he "more likely than not" would have been acquitted had the new evidence been admitted but rather "only that the new evidence is sufficient to 'undermine confidence' in the verdict").

***12** A cumulative evaluation of the materiality of wrongfully withheld evidence is required rather than considering each piece of withheld evidence in isolation. *Wearry*, 136 S. Ct. at 1007 (citing *Kyles*, 514 U.S. at 441, 115 S. Ct. at 1569). Therefore, "[w]e analyze an alleged *Brady* violation 'in light of all the other evidence adduced at trial.' " *Pitman v. State*, 372 S.W.3d 261, 264 (Tex. App.—Fort Worth 2012, pet. ref'd) (quoting *Hampton*, 86 S.W.3d at 612–13). And "[s]ometimes, what appears to be a relatively inconsequential piece of potentially exculpatory evidence may take on added significance in light of other evidence at trial." *Hampton*, 86 S.W.3d at 613. In that type of case, "a reviewing court should explain why a particular *Brady* item is especially material in light of the entire body of evidence." *Id.*

In *Branum*, our most recent published opinion on the subject of materiality under the Michael Morton Act, [10] the defendant was charged with intoxication manslaughter after she "T-boned" another driver when she ran a red light; with regard to Article 39.14, she sought production of the deceased's phone. [11] 535 S.W.3d at 220–21, 223–25. The trial court reviewed the phone's contents *in camera* and held that they disclosed nothing relevant or material. *Id.* at 222. The phone's contents were not made a part of the appellate record, *id.* at 221 n.5, but the State established that the phone was not in use at the time of the accident. *Id.* at 224. We held that Branum's assertion that the phone "could have" revealed significant data was nothing more than a mere possibility, insufficient for purposes of mandatory disclosure under Article 39.14(a), and that she had failed to meet her burden to show that the records were essential or material to a matter involved in the case. *Id.* at 225.

The parties direct us to *Watkins*, a drug possession case now pending in the Texas Court of Criminal Appeals. In that case, the Waco court declined the appellant's invitation to reconstrue the meaning of "material" in the Michael Morton Act. 554 S.W.3d at 824 n.1 (op. on reh'g). While acknowledging that the Legislature anticipated and probably intended a "sea change in criminal discovery," the court held that it was not at liberty to disregard that interpretation because the Legislature did not change the term "material" in the existing statute, which had already been interpreted by the state's highest criminal court. *Id.*

***13** The complaint in *Watkins* was that the State had violated Article 39.14 by failing to provide penitentiary packets and booking sheets before trial and that the trial court had therefore abused its discretion by admitting those items into evidence during the trial's punishment phase. *Id.* at 820. Applying the pre-Michael Morton Act definition of materiality, the court held that because the State had provided notice of its intent to produce evidence of the convictions under Article 37.07 to establish the enhancement paragraphs of the indictment and to seek a longer sentence and because the appellant had pleaded true to the enhancement paragraphs at the punishment hearing, there was no reasonable probability that the trial's outcome would have been different or that his sentence would have been reduced if the exhibits had been produced before trial. *Id.* at 822.

The Austin court has also recently considered materiality under the pre-Michael Morton Act standard. *See Young*, 591 S.W.3d at 597–98. In *Young*, the defendant, an attorney, was charged with forgery, theft, and money laundering after his client died and left a holographic will purporting to name the attorney as his sole beneficiary two months after they met. *Id.* at 585–86, 589. On appeal, the attorney complained that the State had failed to disclose information under *Brady* and Article 39.14 that exculpated him and inculpated someone else as the actual offender or as someone of "greater blameworthiness" and that could have led to the discovery of other exculpatory information. *Id.* at 597. He contended that the State had improperly suppressed evidence from, and pertaining to, the ex-wife of an alleged accomplice, and he attached her affidavit to his motion for new trial. *Id.* at 598–99.

The trial court held a hearing on the motion for new trial and concluded that (1) the defendant had failed to prove that any of the information that he did not already have showed a reasonable probability of a different outcome at trial based on the credibility (and lack thereof) of the previously undisclosed witness and (2) the witness's statements, even if they had been disclosed and used effectively, would not have made a difference between conviction and acquittal. *Id.* at 602–03. The Austin court reviewed the record and the trial court's findings of fact and conclusions of law, held that the record supported those findings, and accordingly overruled the *Brady*/Michael Morton issue. *Id.* at 603.

D. Guilt-Innocence Evidence

Because we must analyze the alleged violation in light of all the other evidence adduced at trial, *see Pitman*, 372 S.W.3d at 264, we have reviewed the entire record of the guilt-innocence phase of the trial. Rita, Amy, Kim, and Martin testified about Hallman and Kim's turbulent relationship, and Rita and Amy testified about various alleged acts of sexual abuse perpetrated by Hallman from 2010 to 2014,[12] starting when each was around twelve years old. Rita, Amy, and Kim testified about Hallman's grooming actions[13] and his sabotaging Kim's relationships with Rita and Amy, but all three acknowledged that sometimes Hallman—not Kim—called the police or CPS. While Kim said that she talked with Rita and Amy about "stranger danger" and sexual abuse awareness but did not tell them that she had been sexually abused by her stepfather, Amy testified that Kim had told them about being sexually abused.

***14** Kim testified that Hallman was different with Amy than with anyone else and treated Amy like a wife, stating during her direct examination,

> He kept her close to him all the time. He did not allow her to leave out of his sight. He did not allow her to leave and go anywhere with me. He would have her outside in the truck with him at -- late at night on school nights, which I complained tremendously about. He said he was spending time with her. He would have her to walk outside in a -- her -- just her robe to get in the truck with him, which I told him that was very appropriate [sic]. When she would spend the night when he was not in our -- residing in the home and he was residing with his sister, he would sleep in the room with her. And I had objections to that, and I told him that she could no longer go and spend the night, neither could the other two younger children because that was inappropriate for him to sleep in the room.

During Kim's cross-examination, she elaborated as follows,

> Q. And, in fact, you thought that there were things going on that concerned you, such as [Hallman] going out to the car late in the evening with [Amy]. Is that what you said?
>
> A. I didn't say late in the evening. I said late at night at 1 o'clock, 2 o'clock in the morning.
>
> Q. Okay. And that would be very strange, wouldn't it?
>
> A. Yes.
>
> Q. Okay. That would definitely be inappropriate from him to take your daughter out at 1:00 in the morning to sit in a car, wouldn't it?
>
> A. He wouldn't actually take her out. He would call her to come out to the car with him.
>
> Q. Okay. And you didn't go out there to see what was going on?
>
> A. Yes, I did on -- on a few occasions.
>
> Q. Just a few?
>
> A. Yes, to see what was going on.
>
> Q. And --
>
> A. They'll be just sitting in the car, and I would make her come in. But with his rage and fits and the abuse that I would have to suffer from whatever I -- whatever instruction I would give the kids or directions, you know, I would tell them to come in, but he would tell them they didn't have to.

Kim did not call the police regarding those incidents but acknowledged that she had called the police on more than one occasion before, and that if she had thought something sexual was going on in the car between Hallman and Amy, that would have warranted calling the police. Two weeks after Hallman was arrested in 2016, Kim retrieved his truck, which had all of Amy's clothing in it as well as Hallman's phone and some of his possessions, from the parking lot. Kim said that she did not call the police and tell them about Hallman's possessions because they were still married at the time so it "was community property." She drove the truck for two weeks and then returned it to CarMax, where Hallman had bought it.[14] She left all of Hallman's belongings in the car when she returned it to CarMax.

***15** Kim said that she had asked Hallman several times if "anything was going on with him" and Amy but that he told her that she was crazy and that he had threatened that if she ever sent him to jail, he would kill her.

Amy and Rita were sent to counseling by CPS in 2015 because they had witnessed the 2014 assault, and Kim said that she told Amy's counselor that she was concerned about Amy's relationship with Hallman. Kim said that she did not know how to bring up the topic of sexual abuse, stating that she told the counselor that Amy and Hallman "had like an enmeshment type of relationship" in which Amy was losing her identity.

Amy denied that she and Rita had ever discussed Rita's sexual abuse allegations against Hallman before Amy made her outcry, but she said that she had witnessed Hallman sexually abusing Rita in the bedroom that she and Rita had shared. Kim admitted that she did not allege sexual abuse in the divorce petition that she filed against Hallman in May 2016, a couple of months after Rita made her outcry, even though she specifically referenced domestic abuse.

Rita testified that Kim did not tell her what to say while testifying and that she had told the truth. When asked whether she had told Rita and Amy to lie, Kim said, "I would never tell them to lie on [Hallman]. I would never lie on something that serious." Kim also testified about her medical[15] and work history, which she said kept her from being aware of what happened at home, and she denied that she had ever been abusive to Hallman.

Officer McKee investigated Rita's delayed outcry in March 2016, four days after Amy left home to live with Hallman. He set up Rita's forensic interview and sexual assault exam and obtained an arrest warrant for Hallman, which was executed on April 7, 2016, and Amy was returned to Kim.

Officer McKee was notified on February 12, 2017—the day before Hallman's trial on Rita's allegations was supposed to begin—that Amy had made an outcry, and he set up a forensic interview and sexual assault exam for her.[16] Officer McKee testified that because Rita and Amy had moved multiple times, he did not think it was feasible to collect physical evidence from the homes where they had lived. He also did not seek a search warrant for Hallman's phone because he "had no reason to believe that there was evidence of a crime on his phone."

Theresa Fugate, a sexual assault nurse examiner (SANE) at Cook Children's Medical Center, testified that she conducted Rita's sexual assault examination on March 23, 2016, and Amy's sexual assault examination on February 17, 2017, and found no physical evidence in either exam. Fugate explained that for nonacute sexual assault (assault occurring 120 hours or more before the exam), there was not likely to be any DNA evidence and that physical injury to the female sexual organ was rare because it was an area meant to stretch. Fugate also testified about what Rita and Amy had told her about Hallman's alleged acts of sexual abuse.

***16** Samantha Torrance, a forensic interviewer at Alliance for Children, Tarrant County's children's advocacy center, testified about how a forensic interview is conducted (nonleading and nonsuggestive questions in vocabulary adjusted to the child's level of development) and about the importance of sensory and peripheral details in a child's account of abuse.[17] Torrance said that as compared to the first time and the last time, "all those other times in between ... blend together if it's something that happened pretty regularly or pretty commonly" and that little discrepancies would occur with each retelling while the major details of a recollection should stay consistent.

Torrance conducted Rita's forensic interview on March 14, 2016, and Amy's forensic interview on February 13, 2017, and said that she had no concerns that either complainant had been coached. On cross-examination, she acknowledged that if Kim had taken advantage of the counseling available at Alliance for Children in the year or so between Rita's and Amy's interviews, she would have been educated on some of the dynamics of grooming, which could have made it more difficult for Torrance to recognize potential signs of coaching. Kim denied having received any training on how to recognize the signs of sexual abuse until after Rita's and Amy's outcries, even though one of her jobs was working in a day care.

At trial, Amy testified about having performed oral sex on Hallman. Yet, Amy acknowledged that during her sexual assault exam she had denied having performed oral sex on Hallman. Amy also acknowledged that she did not mention some of the other incidents, including the "butt plug" game, in her forensic interview.

Fort Worth Police Officer G. Garcia testified that he responded to a domestic disturbance around 3 p.m. on August 9, 2014, the day before the August 10 incident. The suspect that day was Kim, and the complainant was Hallman. Officer Garcia said that Kim did not mention any concerns to him regarding sexual abuse of anyone. He did not see any injuries, and no arrests were made.

Yolanda Sifuentes, who worked for the Tarrant County College South Campus as coordinator of special projects in the Family Empowerment Center, testified that she met with Hallman on March 8, 2016, at 10:52 a.m., and that Amy was with him. Hallman told her that Kim had been diagnosed with bipolar disorder and was abusive to Amy and that he had removed Amy from the situation, resulting in both of them being homeless. Sifuentes, who had been trained to look for signs of abuse, did not notice any injuries to Amy or any red flags during her conversation with Hallman.

The jury deliberated for around seven hours during the first day of deliberations and then for two hours the following day. It sent out thirteen notes during deliberations. Three requests were for timeline information, two were for office supplies, and some requested clarification on the law (which the trial court declined to answer by referring the jurors to the charge) or for portions of the record to which they were not entitled (the transcript of the prosecutor's closing argument). But the jury also asked for portions of Kim's testimony regarding where she slept at night and portions of Amy's testimony about when she was alone with Hallman while Rita was at band practice. The jury ultimately acquitted Hallman of the continuous-sexual-abuse count involving both Rita and Amy but found him guilty of the six remaining counts involving Amy.

E. Application

***17** The State failed to comply with the Michael Morton Act's disclosure requirements until the second day of the punishment phase of Hallman's trial, and Hallman's conviction was entirely dependent on the jury's credibility determinations because there was no physical evidence to support the State's allegations. The jury acquitted Hallman of the most serious count—continuous sexual abuse of children under the age of 14—which was the only count involving both Amy and Rita.

Although the August 10 domestic violence incident was extraneous to the charged offenses, Kim said that she had mentioned the possibility of the sexual abuse of Amy by Hallman to the responding officers that day, but nothing in her written statement, which was not disclosed during guilt-innocence, indicated that she had actually done so. This gave Kim's written statement significant impeachment

value when the responding officer testified that he had no recollection outside of his report. *See Hampton*, 86 S.W.3d at 613 (requiring reviewing court to explain why a particular *Brady* item is especially material in light of the entire body of evidence).

Credibility was the key to this case, and by failing to disclose Kim's written statement to the police—which, contrary to Kim's testimony during trial, did not mention her suspicions that Hallman had been sexually abusing anyone—before or during the guilt-innocence phase of trial, the State deprived Hallman of the opportunity to fully develop his defensive theory that Kim, Amy, and Rita were lying.[18] This undisclosed evidence presented a reasonable probability that a total or substantial discount of Kim's testimony might have produced a different result during the guilt-innocence phase of trial.[19] When weighed and considered against other inconsistencies in Kim's, Amy's, and Rita's testimonies and the lack of any physical evidence that Hallman had sexually abused Amy and Rita, we conclude that this evidence would have been sufficient to undermine confidence in the jury's verdict.[20] *See Wearry*, 136 S. Ct. at 1006. Accordingly, we hold that the State violated Article 39.14's requirements when it failed to disclose Kim's written statement[21] before the punishment phase of trial under the pre-Michael Morton Act definition of materiality.

***18** In summary, no one disputes that the State failed to disclose Kim's statement before the second day of the trial's punishment phase (*Brady* prong 1), and as set out above, it was favorable to Hallman for its impeachment value (*Brady* prong 2), and it was material because of the reasonable probability that it might have tipped the balance and resulted in an acquittal of the remaining six counts involving Amy (*Brady* prong 3). *See Pena*, 353 S.W.3d at 809. Under the circumstances presented here, we hold that the trial court abused its discretion by denying Hallman's motion for mistrial. Thus, we sustain Hallman's sole point.

IV. Conclusion

Having sustained Hallman's sole point, we reverse the trial court's judgment and remand this case for a new trial.

All Citations

--- S.W.3d ----, 2020 WL 2201908

Footnotes

1 We use pseudonyms for the complainants and their family members to protect the complainants' privacy.

2 In addition to Kim's testimony, during the guilt-innocence phase of trial, the jury heard testimony from Rita, Amy, their older half-brother Martin, several police officers, a sexual assault nurse examiner, a forensic interviewer, a Child Protective Services investigator, and a community college program coordinator.

3 The record reflects that before, during, and after the trial's guilt-innocence phase, defense counsel had difficulty in obtaining access to information from the State. For example, regarding access to CPS files involving Amy, on August 14, 2018, the trial court held a hearing on Hallman's motion for continuance based on an April 2016 police report indicating that Amy had been taken into CPS custody at that time and interviewed. Two weeks later, the trial court held another hearing regarding information from CPS's files. Three days after that, on August 31, 2018, the trial court held a hearing with the CPS caseworker who had interviewed Amy on April 7, 2016; the caseworker testified that Amy did not disclose any sexual abuse by Hallman during that interview. Before voir dire, the prosecutor informed the trial court that the State had given Hallman's counsel "a new 39.14 discovery document" because "there was some new information that was scanned."

During the guilt-innocence phase of trial, Hallman's defense counsel objected to photographs of Amy and Rita at the ages they were when the alleged abuse occurred, stating, "That wasn't provided to us as far as I can tell." The prosecutor responded that Kim had provided the photographs around a week ago, "so I don't know if I provided it to [the defense] ... since I've been gone for a week in Florida. But, I mean, I can certainly give [the defense] an opportunity to review them," and stated that the photos, albeit relevant, were "not evidence in the case as far as anything material to the case." The trial court delayed ruling on the objection to give the defense an opportunity to closely look at the photos. And when the defense objected to lack of notice about something that Amy called the "butt plug game" during her testimony, the prosecutor replied, "[I]t is in our notes and this has been open to the Defense." The trial court overruled the objection but noted,

> It's my understanding that the notice was general as to what activities had occurred and general as to the terminology to describe those activities. *And I will find that the notice that was given was adequate but only adequate, that a better practice would be to describe it more fully*, but I don't think the testimony, when matched against the notice given, would create any sort of surprise that would be unfair and does not comply with Michael Morton and the rest of the Code of Criminal Procedure and the statutory and case law requirements for disclosure. [Emphasis added.]

On the same day of the punishment trial that the State disclosed the 13 pages at issue, the State also provided another exhibit—an offense report from a 1999 burglary of a habitation that was alleged to support indicting Hallman as a habitual offender—to the defense.

4 In order to comply with *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), an individual prosecutor has a duty to learn of any "favorable" evidence known to the others acting on the government's behalf in a case, including the police. *Strickler v. Greene*, 527 U.S. 263, 281, 119 S. Ct. 1936, 1948, (1999). "Favorable" evidence includes impeachment evidence. *Id.* at 280, 119 S. Ct. at 1948. And under *Brady*, an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment. *Id.* at 288, 119 S. Ct. at 1952.

5 The offense report included a notation that Hallman was given a chance to write a statement, and it stated, "The Family Violence Packet was completed as well as an [emergency protective order], and turned in at the jail."

6 In his sole point, Hallman also argues that the trial court also abused its discretion by ruling on the motion for mistrial when that judge did not preside over the guilt-innocence phase of trial and urges us to reconsider the standard of "materiality" under Article 39.14(a), referring us to *Watkins v. State*, 554 S.W.3d 819 (Tex. App.—Waco 2018, pet. granted). Based on our resolution below, we do not reach these arguments or the State's responses to them. *See* Tex. R. App. P. 47.1.

7 One of the Article 39.14 complaints raised by the defendant in *Branum* was the State's late designation of an expert witness, which was made less than 20 days before trial. 535 S.W.3d at 222, 226–27. Regarding that issue, we held that because the defense had failed to request a continuance based on the late designation, this rendered any error by the trial court harmless, but we also noted that the defendant could have reasonably anticipated that the witness from the medical examiner's office would testify in the intoxication manslaughter trial. *Id.* at 226–27; *see also Moore v. State*, No. 02-17-00277-CR, 2018 WL 3968491, at *10 (Tex. App.—Fort Worth Aug. 16, 2018, pet. ref'd) (mem. op., not designated for publication). In *Moore*, the prosecutor thought that the nine-page sexual-assault exam report of a fourth sexual abuse victim (not one of the complainants) had been made available via TechShare—the system through which the State electronically shares documents with defense attorneys—but the failure to have "click[ed] on a button" was discovered during the trial's punishment phase. 2018 WL 3968491, at *1, *10. Defense counsel was allowed to review the report during a pause in the proceedings and then made his objections but did not request additional time to review the document, and he cross-examined the witness but did not try to impeach her testimony with the disputed document. *Id.* at *10. We held that the defendant had waived his Michael Morton Act complaint because he did not request a continuance. *Id.* Both of these cases are distinguishable from the facts before us: in *Branum*, the late designation occurred before trial, when a continuance could have actually been useful to the defense, and in *Moore*, the information was disclosed with regard to a punishment witness during the punishment phase of trial—again, when a continuance could have actually been useful to the defense.

8 *Agurs* eliminated the requirement that a request to disclose exculpatory evidence be made. 427 U.S. at 107, 96 S. Ct. at 2399 ("[I]f the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made."); *see Ex parte Chaney*, 563 S.W.3d 239, 266 (Tex. Crim. App. 2018) (citing *Agurs* for the proposition that the defense need not request disclosure of *Brady* evidence because the State's duty to disclose such evidence is an affirmative one).

9 In *Temple*, the prosecutor did not turn over evidence that she believed to be irrelevant. 2016 WL 6903758, at *3 (noting that a prosecutor who errs on the side of withholding evidence from the defense runs the risk of violating *Brady* and holding that prosecutor's misconception regarding her duty under *Brady* was of enormous significance). Defense counsel had requested copies of the offense reports in the case—approximately 1,400 pages, some of which contained favorable evidence that would have allowed a more effective presentation of an alternate suspect—but was denied access to them. *Id.* The court opined that the Michael Morton Act "was created to avoid problems exactly like those that arose in this case." *Id.* at *3 n.20.

10 We addressed the Michael Morton Act in *Coleman v. State*, 577 S.W.3d 623, 634 (Tex. App.—Fort Worth 2019, no pet.), but in the context of disclosure of a confidential informant's identity. We also addressed the Michael Morton Act in *Moody v. State*, 551 S.W.3d 167, 171–72 (Tex. App.—Fort Worth 2017, no pet.), but in the context of video recordings that were no longer in existence at the time the defendant requested them. And we addressed it in *Love*, but in the context of whether the trial court abused its discretion by disqualifying the appellant's retained defense counsel after he improperly

gave his copy of the State's discovery to the appellant's wife. 2020 WL 1466311, at *1, *11, *13 (noting that the Act does not have any mechanisms for dealing with discovery violations on defense counsel's part).

11 In addition to her Article 39.14 complaints about the deceased's phone and the late expert designation, the defendant in *Branum* also complained that she did not receive the bar manager's statement to the Texas Alcoholic Beverage Commission. 535 S.W.3d at 225–26. We held that even if TABC were considered to be the "State" for Article 39.14's purposes, applying the nonconstitutional harm analysis under Texas Rule of Appellate Procedure 44.2(b), Branum did not show that failing to order the State to disclose the statement affected her substantial rights by denying her access to evidence that would have changed the trial's outcome in her favor when another witness testified to the same facts, without objection, as the bar manager: Branum's time of arrival at the bar, her approximate number of drinks, and her time of departure. *Id.*

12 Kim and Hallman would fight and then Kim and the children would move; Hallman would move in with them again later. After his August 10, 2014 arrest, Hallman no longer lived with them, but he still had visits with the children "after the CPS case was cleared and closed."

13 The forensic interviewer testified that "grooming" is a term used to describe how a sexual abuse perpetrator gains access to his or her victim with the purpose of developing some kind of trust or relationship so that when the perpetrator decides to act, the victim is conflicted about telling. Threats would also fall into the grooming category, i.e., when a perpetrator tells a child that if the child discloses the abuse, someone would get hurt or something bad would happen to the child or the child's family. She said that other examples of grooming included using religion to justify the abuse and buying things for the victim "like lingerie, bras, sex toys, things like that."

Rita said that if she or Amy wanted something from Hallman, he would tell them "to do things like to him, or [they] had to let him see one of [their] private parts if [they] wanted something like clothes or shoes or anything. And ... he would also have [them] smoke weed with him." Rita and Amy said that he showed favoritism to them over Ron or Kelly, the household's two younger children; Kim confirmed that he treated Rita and Amy more generously than their younger siblings. Kim said that Hallman would take Rita and Amy to buy lingerie when Rita was fourteen or fifteen years old and Amy was almost thirteen years old. Amy said that when she was bullied at school, Hallman "would just give [her] things," including words of encouragement, which drew her to him, and that he warned her that if she told anyone about the sexual abuse, he would go to jail. Amy also stated that Hallman told her that "God said it's nothing wrong with what he's doing."

14 Officer McKee testified that he did not know what had happened to Hallman's vehicle after Hallman's arrest but that Amy was found waiting in the vehicle for Hallman on the day of the arrest. Officer McKee acknowledged that "[a]nything is possible" when asked on cross-examination that there might possibly have been evidence of sexual assault when Hallman and Amy had been living in the vehicle.

15 Kim testified that she took 26 different medications, for lupus, high blood pressure, heart problems, rheumatoid arthritis, bipolar disorder, epileptic seizures, lymphatic problems, and thyroid problems.

16 Hallman was reindicted with both Rita and Amy as complainants.

17 Torrance explained that sensory details describe what a child could feel, hear, or see during an incident while peripheral details were those surrounding the incident—where it happened, what else happened that day, and where other people were when it occurred.

18 The jury apparently determined that Rita was not credible because it did not find Hallman guilty of the only count involving her.

19 Neither *Watkins* nor *Branum* involved a battle of the sort that routinely occurs in a sex-related case: the "he-said, she-said" confrontation that requires impeachment evidence to facilitate the jury's determination of the witnesses' credibility. There was no question in *Branum* that the defendant was driving when she crashed into the deceased's vehicle and killed him, and in *Watkins*, the defendant had notice under Article 37.07 and pleaded true to the offenses listed in the indictment's enhancement paragraphs. In contrast to the undisclosed witness in *Young*, Kim was one of the State's principal witnesses in the sexual abuse case against Hallman.

20 The State argues that Hallman was able to impeach Kim's testimony through Detective Robles's testimony and the offense report, but Detective Robles testified that he had no independent recollection outside of the offense report, and Kim's handwritten statement directly contradicting her testimony at trial regarding whether she mentioned potential sexual abuse of Amy by Hallman—the central issue at trial—would have provided the jury with stronger evidence of her credibility or lack thereof.

21 The State's failure to timely disclose Hallman's written statement, on the other hand, was harmless because Hallman made that statement. *See Havard v. State*, 800 S.W.2d 195, 204 (Tex. Crim. App. 1989) ("[A]ppellant knew of both the existence and the content of his statement, as a matter of simple logic, because he was there when it was made."). And

based on our resolution here, we need not reach whether the undisclosed family violence packet would also have made a difference. *See* Tex. R. App. P. 47.1.

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